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May 15, 2013

Ms. Molly C. Dwyer
Clerk of the Court
United States Court of Appeals
for the Ninth Circuit
95 Seventh Street
San Francisco, CA 94103-1526

Re: *Kerr v. Salazar*, No. 12-35084
(Amicus Brief of the Project on Government Oversight)

Dear Ms. Dwyer:

On April 26 this Court ordered supplemental briefs on whether the Whistleblower Protection Enhancement Act (WPEA) should be applied retroactively, i.e., to pending cases pending when enacted. The Project On Government Oversight (POGO) requests leave to file an *amicus curaie* brief on the issue. Counsel for both parties have consented to filing this brief, including its length.

The Project On Government Oversight is a nonpartisan, independent watchdog for good government reforms. Its investigations into corruption, misconduct, and conflicts of interest achieve a more open, effective and accountable government. Working with whistleblowers to expose government

waste, fraud, abuse, and illegality is an integral part of POGO's mission. Ensuring strong whistleblower protection is one of our core priorities. POGO helped lead efforts to pass the Whistleblower Protection Enhancement Act ("WPEA"), serving as a steering committee member of the Make It Safe Coalition, testifying before Congress, lobbying for the strongest possible provisions, urging the public to take action, and organizing critical support. The law's retroactive application is of great concern to POGO, because it will directly influence the effectiveness and legitimacy of WPEA reforms and deeply affect many deserving whistleblowers who have waited years for restoration of the rights intended for them all along.

I. WPEA'S APPLICATION IS NOT RETROACTIVE SINCE IT IS A CLARIFICATION OF LAW

The WPEA clarifies rights established since 1978 in 5 USC 2302(b)(8) by eliminating judicial decisions that erroneously rewrote the statute's plain language. Applying a clarifying statute to pending cases is not retroactive application of the law. *Baptist Memorial-Golden Triangle v. Sebelius* 566 F.3d 226, 229 (D.C. Cir. 2009). *See also Brown v. Thompson,* 374 F.3d 253, 259 (4th Cir. Va. 2004); *Cortes v. American Airlines, Inc.*, 177 F.3d 1272, 1283 (11th Cir. Fla. 1999); *Liquilux Gas Corp. v. Martin Gas Sales*, 979 F.2d 887, 890 (1st Cir.1992);

Statutory construction is the first step to learn whether a new statute is clarifying. *See Loving v. United States,* 517 U.S. 748, 770 (U.S. 1996). This is

especially true if the enacting body's declaration is included in an amendment's text. *Cortes,* 177 F.3d at 1283. Courts also examine an amendment's legislative history for consistency with a "reasonable" interpretation of the original statute. *See Liquilux*, 979 F.2d at 890; *Sykes v. Columbus & Greenville Ry.*, 117 F.3d 287, 293-94 (5th Cir.1997); *SEC v. Clark, 915 F.2d 439*, 451-52 (9th Cir.1990)

Section 101 of S.743, the final WPEA language, is entitled "Clarification of Disclosures Covered [.]" The loopholes that Congress removed in Section 101 are directly relevant for this proceeding -- disclosures to wrongdoers, supervisors and as part of job duties.

The Senate Report explanation for Section 101 is entitled, "Clarification of what constitutes a protected disclosure[.]" It not only is unequivocal about the "no exceptions" scope of the 2012 legislation, it quotes dispositive legislative history from the 1989 and 1994 statutes demonstrating that the new law reaffirms what Congress wrote and intended all along.

S. Rep. No. 112-155, 112th Cong., 2d Sess. (2012), at 4 ("Senate Report"): The 1994 amendments "were intended to reaffirm the Committee's long-held view that the WPA's plain language covers 'any' disclosure .... S. 743 *makes clear, once and for all*, that Congress intends to protect 'any disclosure' of certain types of wrongdoing in order to encourage such disclosures." (emphasis added) *Id.,* at 4-5.

The Report specifically cited and rejected two precedents relevant here -- *Horton v. Department of the Navy*, 66 F.3d 279, 282 (Fed. Cir. 1995) (disclosures to alleged supervisory wrongdoer not protected); and *Willis v. Department of Agric.*, 141 F.3d 1139, 1144 (Fed. Cir. 1998) (disclosures made during an employee's normal job duties are not protected).

As emphasized, "Section 101 amends the WPA ... by *clarifying* that a whistleblower is not deprived of protection just because the disclosure was made to an individual, including a supervisor, who participated in the wrongdoing...Finally, an employee is not deprived of protection merely because the employee made the disclosure in the normal course of the employee's duties..." (emphasis added) Senate Report, at 5. Section 101(b) makes –

> *clear* that 'any disclosure' means 'any disclosure' by specifically stating that a disclosure does not lose protection because: the disclosure was made to a person, including a supervisor, who participated in the wrongdoing disclosed.... Section 101(b) also *clarifies* that a disclosure is not excluded from protection because it was made during the employee's normal course of duties, providing the employee is able to show reprisal....

Senate Report, at 41 (emphasis added).

Indeed, the Senate Report explicitly relies on the principle of clarification to apply the WPEA retroactively to pending cases: "Such application is expected and appropriate because the legislation generally corrects erroneous decisions by the

MSPB and the courts..." *Id.,* at 52. *See also* H. Rep. No. 112-508, 112th Cong., 2d Sess. (2012), at 6 ("House Report").

With respect to statutory language, Ms. Kerr's disclosures always have been protected under 5 USC 2302(b)(8). It is not retroactive to respect Congress' latest affirmation of the same legal rights it has legislated four times since 1978.

II. RETROACTIVE WPEA APPLICATION SATISFIES SUPREME COURT STANDARDS NOT TO CREATE MANIFEST INJUSTICE BY MATERIALLY PREJUDICING PARTIES

The keystone case on retroactivity is *Landgraf v. USI Film Prods,* 511 U.S. 244 (1994). The Court addressed implementation of laws with an effective date but without guidance on retroactive application. It reconciled two longstanding valid but conflicting principles -- (1) a presumption against statutory retroactivity which occurs when a new law "takes away or impairs vested rights acquired under existing laws, or creates a new obligation, imposes a new duty, or attaches a new disability, with respect to transactions or considerations already past . . . ." *Landgraf,* 544 U.S. at 569, 572-73 (citations and internal quotations omitted); and (2) the doctrine that a court should "apply the law in effect at the time it renders its decision," even though that law was enacted after the events that gave rise to the suit. *Id.,* at 273, quoting *Bradley v. School Bd. of Richmond,* 416 U.S. 696, 711 (1974).

The Court concluded the two doctrines can be reconciled by a qualified presumption against retroactivity that creates new burdens prejudicing a party. But the presumption is rejected where there is explicit congressional intent for retroactivity consistent with or necessary for a statute's purpose. *Landgraf*, 544 U.S., at 262.

The Court also emphasized the presumption should be applied flexibly on a case-by-case basis after a "process of judgment concerning the nature and extent of the change in the law and the degree of connection between the operation of the new rule and a relevant past event." *Id.,* at 269-70 The Court warned not to be mechanical in application. If citizens were "made secure against any change in legal rules, the whole body of our law would be ossified forever." (citation omitted) *Id.,* at 270.

Not all disruption disqualifies retroactivity. More in needed than "potential unfairness." *Id.,* at 272 The Court explained the presumption's purpose -- to guard against changing "settled expectations" without "individualized consideration.... Familiar considerations of fair notice, reasonable reliance and settled expectations offer sound guidance." *Id.,* at 266, 270. Another primary criterion is whether retroactivity threatens contractual or property rights, either between private parties or from government "taking." *Id.,* at 269-71; Laitos, "Legislative Retroactivity," 52 *Journal of Urban and Contemporary Law* 81 (1997)

The composite rule is that courts should apply the law in effect, "unless doing so would result in manifest injustice or there is statutory direction or legislative history to the contrary." *Id.,* at 277 (quoting *Bradley v. School Bd. of Richmond, supra,* 416 U.S. at 711). *Bradley* instructs to consider three factors in assessing whether a manifest injustice would occur: "(a) the nature and identity of the parties, (b) the nature of their rights, and (c) the nature of the impact of the change in law upon those rights. *Bradley*, 416 U.S. at 717. Relevant criteria include whether retroactive application will strengthen significant public interests. *Id.,* at 712.

With respect to the nature of rights affected, a public interest criterion also is relevant. As explained in a municipal employment case, "The City never had a vested or unconditional right to discriminate against individuals in the workplace ...." *Guess v. City of Portage,* 58 Fair Empl. Prac. Cas. (BNA) 250 (N.D. Ind. 1992).

The primary criterion for the third factor is the element of surprise that upsets legitimately settled expectations. It seeks to prevent "the possibility that new and unanticipated obligations may be imposed upon a party without notice or an obligation to be heard." *Bradley*, 416 U.S. at 720.

With respect to the criterion on nature of the parties, the *Huffman* loopholes do not concern disputes between private parties. The WPEA defines when

government employees may safely uphold their duties under the Code of Ethics for Government Service. When Congress originally passed whistleblower rights in 1978, a bi-partisan coalition of seventeen senators summarized the reason as vindicating and protecting employees who honor the Code of Ethics for Government Service on the job. *Reprinted in* 124 *Cong. Rec.* S14302-03 (daily ed. Aug. 24, 1978). As observed in the "Leahy Report," a 1978 Senate Judiciary Committee study that provided the in-depth public policy foundation for whistleblower rights, "Fear of reprisal renders intra-agency communications a sham, and compromises not only the employee, management and the Code of Ethics, but also the Constitutional function of congressional oversight itself. *The Whistleblowers: A Report on Federal Employees Who Disclose Acts of Government Waste, Abuse and Corruption Prepared for the Senate Comm. on Governmental Affairs,* 95th Cong., 2d Sess. 49 (1978). That explains unanimity every time rights in section 2302(b)(8) were enacted and reenacted in final votes, four times since 1978.

The nature of the rights further rebuts manifest injustice concerns. As seen, there is no general right to retaliate. Managers still may take any valid action they would have independently, even if illegal retaliation were a contributing factor. 5 USC 1221(e). Indeed, the WPEA strengthens their ability to manage by freeing up the flow of information.

Finally, it cannot be seriously contended that retroactive application would surprise anyone. The WPEA or earlier versions received unanimous chamber and committee votes in every Congress since 2004. Approval only was delayed through secret holds that blocked final enactment at each session's end. Government management views were voiced actively. To illustrate, employee burdens were raised to require retaliatory animus for "job duty" disclosures to prevail. (Senate Report, at 5-6).

Banning harassment of whistleblowers is not new; it is only newly enforceable under the WPEA. Agency officials always have been on notice that whistleblower retaliation is illegal, even if judicial loopholes deprived enforcement. In 5 USC 2301(b)(9) there are no loopholes in merit system principles for lawful disclosures to possibly wrongdoing supervisors, or those that are part of job duties.

Further, agency managers are on notice for another law which "implements or directly concerns merit system principles" under 5 USC 2302(b)(11) -- the Code of Ethics for Government Service. Pub. L. 96-303, 94 Stat. 855 (July 3, 1980) and 5 CFR Part 2635. They have seen its controlling guidance every day, because by law it must be displayed in every government office.

It would create a manifest injustice to deny WPEA retroactively. It would be an injustice to permit punishment of employees for honoring their duties, merely

because they fulfilled them in the "wrong" context or too soon. As the Senate Report concluded, retroactive application is "expected and appropriate because the legislation ... removes and compensates for burdens that were wrongly imposed on individual whistleblowers exercising their rights in the public interest; and improves the rules of administrative and judicial procedure and jurisdiction applicable to the vindication of whistleblowers' rights." (Senate Report, at 52).

III. CONGRESSIONAL INTENT IS CLEAR: APPLY THE STATUTE RETROACTIVELY

Clear congressional intent mandates retroactivity. This final criterion has supremacy over the other factors. *Landgraf*, 544 U.S. at 262, 2168-69.

Previous Federal Circuit Court of Appeals cases have been inapposite, concerning legislation specifically authorizing retroactivity in some sections but not others, *Bernklau v. Principi, 291 F.3d 795*, 803-804 (Fed. Cir. 2002)); not containing relevant legislative history on retroactivity, *Caddell v. DOJ, 96 F.3d 1367, 1371* (Fed. Cir. 1996); or explicitly rejecteing retroactivity, *Terran v. Secretary of HHS*, 195 F.3d 1302, 1315-16 (Fed. Cir. 1999); *Avila v. Office of Personnel Management*, 79 F.3d 128, 131 (Fed. Cir. 1996).

In other jurisdictions, however, courts consistently have found clear congressional intent under *Ladnsgraf* for retroactivity without prescriptive statutory language. Committee reports have been primary sources. *See United*

States v. Olin Corp., 107 F.3d 1506, 1512-1513 (11th Cir. Ala. 1997), In *Olin*, the 11th Circuit relied on committee reports to hold that denying retroactively would frustrate clear congressional intent to punish pre-enactment polluters. *Olin,* 107 F.3d at 1514. *See also Ninth Ave. Remedial Group v. Chalmers*, 946 F. Supp. 651, 660 (N.D. Ind. 1996). The court examined committee reports and member statements to discern that while Congress had different motivations and ideas on the bill's scope, it clearly intended enforcement against pre-enactment polluters. *Id,* 946 F. Supp. at 662-64

Before and since *Landgraf*, courts have inferred clear congressional intent from a bill sponsor's floor statement when consistent with statutory language or other legislative history. *Department of Toxic Substances Control v. Interstate Non-Ferrous Corp.,* 99 F. Supp. 2d 1123, 1135 (E.D. Cal. 2000) (quoting *Brock v. Pierce County,* 476 U.S. 253, 263 (1986). *See also Leake v. Long Island Jewish Medical Center,* 695 F. Supp. 1414, 1417, *affirmed Leake v. Long Island Jewish Medical Center*, 869 F.2d 130 (2d Cir. N.Y. 1989).

In the WPEA it is undisputed that Congress did not expressly prescribe the statute's temporal reach. As with *Landgraf*, the effective date states it will take effect 30 days after enactment (WPEA Sec. 202) but is silent on retroactivity.

The *Landgraf* record was muddled on retroactivity. The relevant bill had been vetoed a year before by the President on grounds that retroactive application

of the statute was unfair. The reintroduced bill diluted retroactivity, and an "interpretive memorandum" was introduced by seven Senators emphasizing that the statute was not retroactive in application unless explicitly stated. *Landgraf,* 511 U.S. at 262 n.15.

The record for WPEA retroactivity is the opposite of *Landgraf.* Again, a section-by-section analysis of the Senate Report states that the Committee "fully expects" the law to be applied in "judicial proceedings initiated by or on behalf of a whistleblower and pending on or after that date." (Senate Report, at 52). As with *Olin*, the Senate Report adds that wrongful burdens have been imposed on whistleblowers exercising their rights. (Senate Report, at 4-7). The House Report is silent.

Ultimately, Congress chose S. 743 for final passage with major modifications, such as removing jury trials, Board summary judgment authority, intelligence community WPEA rights, and protection against retaliatory security clearance actions. However, there were no changes on retroactivity, and no subsequent contrary legislative history to the Senate Report's unqualified mandate and instruction to apply the WPEA retroactively. The only floor statement came from the legislation's original sponsor Todd Platts, for whom the House bill was named. (House Report, at 12). He directly quoted the Senate Report on retroactivity and supported its mandate for retroactive application to pending cases:

"[I]t must be understood that those whistleblowers who have been waiting for this bill to be enacted are protected by its provisions." 158 Cong. Rec. E1664 (Sept. 28 2012). Clearly, Congress has considered and consistently expressed its intent.

Complementing the supremacy of congressional intent, *Landgraf* and *Olin* call for similar deference with respect to a statute's purpose. *Landgraf*, 511 U.S. at 268-69; *Olin,* 107 F.3d at 1513-14. Not applying the statute to pending cases would frustrate the purpose of the statute of achieving the law's "original intent and purpose[--] ... "broad protection of whistleblower disclosures." (Senate Report, at 4, 6). Not applying the WPEA retroactively would frustrate that purpose by continuing to deny justice for the same whistleblowers Congress intended to protect all along, through discredited standards that have been specifically overturned as erroneous barriers to the public interest in accountable government. The statute must be applied retroactively because of clear congressional intent.

Respectfully submitted,

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I, Stephen Moore , declare that I am not a party to the action, am over 18 years of age and my business address is: 354 South Spring St., Suite 610, Los Angeles, California 90013.

On 05/15/2013 declarant served the within: Letter Brief of Amicus Curiae Project on Government Oversight re Kerr v. Salazar, Case No. 12-35084

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